Supreme Court, U.S.
FILED

No. 01 1696 MAY 17 2002

OFFICE OF THE CLERK

In the
Supreme Court of the United States

DR. KENJI NISHIOKA,
Petitioner,

v.

THE UNIVERSITY OF TEXAS
M.D. ANDERSON CANCER CENTER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ELLEN SPROVACH
Counsel of Record

C/O GREGG M. ROSENBERG
& ASSOCIATES
11 GREENWAY PLAZA
SUITE 2810
HOUSTON, TX 77046
(713) 960-8300

Counsel for Petitioner

Of Counsel:
GREGG M. ROSENBERG
& ASSOCIATES

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

55 pp

QUESTIONS PRESENTED FOR REVIEW

Whether there is a compelling reason to grant the Petition for Writ of Certiorari because the United States Court of Appeals for the Fifth Circuit has decided an important question of Federal Law that has not been but should be settled by this Court.

Whether the timing of the "end" of the protected activity in relation to the retaliatory event or events establishes the required nexus. 42 U.S.C. § 2000e-3.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Parties are not required to file a corporate disclosure statement. Petitioner/Plaintiff is an individual. Respondent/Defendant is a State of Texas governmental entity.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS . . . . . iii-iv

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 1

OPINIONS BELOW 1

I STATEMENT OF THE CASE 1

A. Statutes Involved as the Basis for Federal Jurisdiction in the Court of the First Instance 1

B. Facts Material to the Consideration of the Questions Presented 3

II SUMMARY OF THE ARGUMENT 5

III REASONS FOR GRANTING WRIT 6

A. Dr. Nishioka Has Brought an Important Question of Federal Law That Has not Been, but Should be Settled by this Court 6

B. The Standard Necessary to Survive Summary Judgment/Application of Law 9

1. Nishioka established a Prima Facie Case of Retaliation 9

2. Nishioka engaged in a protected activity 10

3. Defendant performed adverse actions against Nishioka 10

4. Defendant's denial of access and destruction of the peptides was directly linked to Nishioka's protected activity 10

5. M.D. Anderson does not have a legitimate business reason to explain why it discarded Dr. Nishioka's lifetime work 12

6. Inference of Retaliation 16

IV CONCLUSION 16

APPENDIX 1a

Appendix A - Fifth Circuit Denial of Petition for Rehearing - 02/22/02 . . . . . 1a

Appendix B - Fifth Circuit Per Curiam Opinion - 01/23/02 . . . . . 3a

Appendix C - District Court Memorandum and Order - 05/09/01 . . . . . 7a

Appendix D - District Court Final Judgment - 03/07/01 . . . . . 11a

Appendix E - District Court Memorandum and Order - 03/07/01 . . . . . 13a

TABLE OF AUTHORITIES

CASES **PAGE**

Mayberry v. Voight Aircraft Co.,
55 F.3d 1086 (5th Cir. 1995) 6, 9, 11

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 9

Nowlin v. Resolution Trust Corp.,
33 F.3d 498 (5th Cir. 1994) 10

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 9

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 9, 16

Shirley v. Chrysler First Inc.,
970 F.2d 39, 41 (5th Cir. 1992) 9, 11

STATUTES

28 U.S.C. § 2101(c) 1

42 U.S.C. § 2000e-3 . . . . . 1, 5, 16

SUPREME COURT RULES

Supreme Court Rules 12.1, 13.1, 13.3 and 29 1

Supreme Court Rule 29.6 ii

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to hear this case under 42 U.S.C. § 2000e-3. Jurisdiction is also proper and timely pursuant to 28 U.S.C. § 2101 (c), Supreme Court Rules 12.1, 13.1, 13.3, and 29.

OPINIONS BELOW

Appellant is appealing a Denial of a Petition for Panel Rehearing entered February 22, 2002 by the United States Court of Appeals for the Fifth Circuit and a judgment of the United States Court of Appeals for the Fifth Circuit entered on January 23, 2002.

The United States District Court for the Southern District of Texas entered a final order on May 9, 2001 and a Summary Judgment order on March 7, 2001.

I

STATEMENT OF THE CASE

A. Statutes Involved as the Basis for Federal Jurisdiction in the Court of the First Instance

42 U.S.C. § 2000e-3.

> (a)Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment,

for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception.

It shall be an unlawful employment practice for an employer, labor organization employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to , or employment in, any program established to provide

apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex or national origin is a bona fide occupational qualification for employment.

B. *Facts Material to the Consideration of the Questions Presented*

Petitioner - Plaintiff Kenji Nishioka is a PhD. who was employed as a biochemist with M.D. Anderson as a faculty member and professor of oncology for a period of almost 23 years, from 1972 through 1995. In 1994, M. D. Anderson determined not to renew Nishioka's contract and his last day of employment was to be August 31, 1995. In 1995, Nishioka filed an EEOC charge of discrimination, received a right to sue letter and filed a lawsuit in Federal Court where a temporary injunction hearing was held by United States Magistrate Judge Nancy Johnson. At the hearing, Nishioka made the first of many formal requests for access to items to include research, however, Magistrate Judge Johnson did not make any ownership determinations. Summary Judgment was granted for the Defendant and Nishioka appealed to the Fifth Circuit. The case was ultimately dismissed by an order entered on December 10, 1997.

Dr. Nishioka made many verbal requests for personal property, (including his requests at the August 31, 1995 TRO hearing) which included research materials, specifically

peptides. On October 15, 1996, Nishioka formally made a written request for research materials, via letter to M.D. Anderson, specifically requesting the release of five categories of research materials, with item "E" individually listed as peptides. M.D. Anderson's agent, Susan Diane Stanford, informed Plaintiff in a telephone call that the data and materials were not to be released. On November 19, 1996, M.D. Anderson sent a letter to Plaintiff releasing many items but carefully omitting any reference to item "E", the peptides. The record shows that the letter was attempted three times, without success, though Plaintiff was not away and did not move.

On April 30, 1997, Nishioka wrote a second letter, this time addressed to the new president of M.D. Anderson. Within two weeks, Dan Fontaine, the chief legal officer of M.D. Anderson responded in writing to Nishioka, releasing items A-D. For the first time, M.D. Anderson responded regarding item "E", the peptides, stating that in the summer of 1996, the lab freezer failed and all contents experienced a temperature decrease. The supplies were allegedly moved to another freezer, which also failed, and when that freezer was cleaned that spring (1997) all contents were assumed damaged and ultimately discarded.

Diane Stanford, Respondent's agent responsible for the labs, testified that she recalled power outages in the summer of 1996 and January 1997. She transferred materials to the second freezer but did not recall discarding any items.

Ms. Stanford did request permission to clean out Dr. Nishioka's freezers in early 1998 in order to prepare it for a new faculty member. Ms. Stanford's boss, Karen Myers, told her that **the lawsuit was over** [emphasis ours] and that she could now discard the items in the freezers Dr. Nishioka had

utilized. Stanford did discard the items in the freezers in 1998, less than one month after the Fifth Circuit Appeal was denied. Additionally, she testified that both freezers were running in early 1998.

II

SUMMARY OF THE ARGUMENT

Both the District Court and the United States Court of Appeals for the Fifth Circuit decided, erroneously, an important question of Federal that has not been, but should be, settled by this Court. There are compelling reasons why this Court should grant this Petition for Writ of Certiorari and consider these important questions.

Specifically, the Courts determined that the issue of the timing of the denial of Dr. Nishioka's Appeal in the United States Court of Appeals for the Fifth Circuit was not the activity triggering the adverse action. Respondent/Defendant M. D. Anderson's agent instructed an employee to destroy Dr. Nishioka's lifetime research (in the form of peptides) because, in their own words, Dr. Nishioka's lawsuit was over. In other words, once M.D. Anderson believed that their liability was over, the liability stemming from the protected activity, they took the adverse actions against Dr. Nishioka.

The District Court erred in holding that Nishioka did not meet his prima *facie* case of retaliation under 42 U.S.C. § 2000e-3. Dr. Nishioka asserts that the District Court's reasoning regarding Nishioka's *prima facie* case was incorrect, that the District Court misapplied law to fact and settled an important question of law that should be settled by this Honorable Court. Moreover, Nishioka further asserts

that in evaluating the summary judgment standard, the District Court inappropriately weighed the evidence in favor of M. D. Anderson. In effect, the District Court assumed there was fact issues present and went on to assume the role of fact finder. The District Court granted summary judgment on its own factual determinations, which are best left to the proper fact finder, the jury. Therefore, despite the existence of Nishioka's *prima facie* case, the District Court denied Nishioka his right to a jury trial. The United States Court of Appeals for the Fifth Circuit went on to affirm that ruling.

III

REASONS FOR GRANTING WRIT

A. *Dr. Nishioka Has Brought an Important Question of Federal Law That Has not Been, but Should be Settled by this Court.*

Normally in a Title VII retaliation case, courts are concerned with the timing of the protected activity as it relates to the adverse action. *Mayberry v. Voight Aircraft Co.,* 55 F.3d 1086 (5th Cir. 1995). Normally, however, the concern is "close" timing, in other words, the adverse action occurs close in time to the onset of the protected activity, i.e., filing a charge of discrimination or a lawsuit. In Nishioka's case, though timing to the protected activity is very important, indeed, although it is not necessarily the timing of the initial filing that is the issue. With regard to the destruction of the peptides, Dr. Nishioka's case involves the polar opposite with regard to timing, the final dismissal of the Fifth Circuit Appeal of the original lawsuit. It was at that time, when M.D. Anderson believed Nishioka's lawsuit was over and their liability expired, that the destruction of the peptides or the items in the freezer, was ordered.

Susan Diane Stanford was the individual responsible for the equipment that stored Nishioka's peptides. In early 1998, she sought to clean out Nishioka's laboratory space and prepare it for the arrival of a new faculty member. She specifically asked her boss, Karen Myers, if she could clean out Dr. Nishioka's freezers and laboratory space. Karen Myers informed Ms. Stanford that now that the lawsuit was settled she could go ahead and clear out everything. A. The only discussion we had of it was that the lawsuit – the issue was over and I could freely do whatever I needed to do. Q. When was that discussion? A. That would have been when I asked to clean out the freezers. Deposition of Susan Diane Stanford, page 48. Defendant themselves link the lawsuit (and what they believed to be its end) to the contents of the freezer. In the instant case, the issue is not the onset of the protected activity but rather the termination of it. It was only when the Defendant believed that they were no longer subject to any liability that they destroyed Dr. Nishioka's lifetime work.

Defendant denied Plaintiff access to the research materials from the onset of the protected activity. Nishioka requested the peptides both formally and informally many times. The lower courts indicate that there is irrefutable evidence that rather than retaliating against Dr. Nishioka, M.D. Anderson was merely following its policy with regard to departing faculty. Nishioka's supervisor, Dr. Pollock, testified that another researcher, Dr. Neil Pellis, removed his research and materials *before* he left Defendant's employment. To the contrary, Dr. Pellis testified that he had unfettered access to his research and material *after* he left Defendant's employ. Indeed, Dr. Pellis did not have on site supervision after he left M.D. Anderson's employ. The only significant difference between Dr. Pellis and Dr. Nishioka is

that Dr. Nishioka engaged in a protected activity. Affidavit of Neal R. Pellis.

Utilizing the above argument, had Dr. Nishioka not engaged in protected activity, he too, would have had unfettered access to his research materials like Dr. Pellis. Had Dr. Nishioka not filed his lawsuit, his materials would not have been discarded in early 1998 as Defendant only gave permission to discard it because "his lawsuit was over".

The District Court for the Southern District of Texas held that "[t]he time span between the lawsuit and the alleged retaliation is substantially longer than periods courts have normally found to raise an inference of causation." Memorandum and Order Entered May 9, 2001, Rosenthal, J. The District Court went on to determine, "[a]ssuming the facts in the light most favorable to Nishioka, approximately one and one-half years elapsed between the filing of Nishioka's lawsuit and the destruction of the peptides." Memorandum and Order entered March 7, 2001, Rosenthal, J. p. 17. Additionally the United States Court of Appeals for the Fifth Circuit held that it was "not this court's decision affirming the district court's dismissal of Nishioka's Title VII case, as Nishioka claims, but rather Nishioka's filing a Title VII lawsuit, which occurred well over a year before Nishioka first requested and the defendant thereafter destroyed the peptides at issue. Decision Affirming Summary Judgment, filed on January 23, 2002, The United States Court of Appeals for the Fifth Circuit. P. 2-3. Therefore, the United States Court of Appeals for the Fifth Circuit decided an important issue of law that should properly be decided by this Court.

B. *The Standard Necessary to Survive Summary Judgment/Application of Law.*

1. **Nishioka established a *Prima Facie* Case of Retaliation**

In order for a plaintiff to establish retaliation by showing that: (1) he engaged in an activity protected by Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the protected activity and the adverse employment decision. *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 41 (5th Cir. 1992). The establishment of a *prima facie* case gives rise to an inference of retaliation. *Id.* This inference of retaliation, in turn, shifts the burden of proof to the Defendant, who must then articulate a legitimate nondiscriminatory reason for the challenged employment action. *Id; McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). The trier of fact can determine from the falsity of explanation the Defendant is dissembling to cover up a discriminatory or retaliatory purpose. *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133 (2000).

The Supreme Court held that Title VII's anti-retaliation provisions extend to former employees as well as employees. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Dr. Nishioka was a former employee of Respondent/Defendant.

M.D. Anderson condoned, and in fact, encouraged and directed Diane Stanford, the laboratory personnel, to destroy Dr. Nishioka's lifetime research.

The Fifth Circuit has held that the timing of the protected activity and the bad event or adverse action can be a significant factor. *Mayberry v. Voight Aircraft Co.*, 55 F.3d

1086 (5th Cir. 1995). Nishioka need not show the Court that the protected activity was the sole motivating factor for the adverse action, but he must show that "but for" the protected activity, he would not have been subjected to the adverse employment action. *Nowlin v. Resolution Trust Corp., 33 F.3d 498* (5th Cir. 1994).

2. Nishioka engaged in a protected activity.

Defendant does dispute this element of Plaintiff's *prima facie* case. In 1995, Nishioka filed a charge of discrimination with the Equal Employment Opportunity Commission and received a right to sue letter. He then filed a Title VII discrimination lawsuit. On March 5, 1997, the federal district court dismissed Nishioka's Title VII suit on summary judgment. Nishioka filed an appeal with the Fifth Circuit, which was affirmed on December 10, 1997.

3. Defendant performed adverse actions against Nishioka.

Defendant does not dispute this element of Nishioka's claim either. Defendant denied Nishioka access to and ultimately destroyed Nishioka's lifetime culmination of research material, most specifically peptides, after Plaintiff formally and informally requested the peptides.

4. Defendant's denial of access and destruction of the peptides was directly linked to Nishioka's protected activity.

Defendant themselves link the lawsuit (and what they believed to be its end) to the contents of the freezer (the adverse action). While timing between a protected activity and the adverse action can support a finding of causation,

normally the concern is "close" timing. *Mayberry*, 55 F.3d 1086, 1092. The Fifth Circuit has held in *Shirley v. Chrysler First, Inc.*, that fourteen months between the onset of the protected activity and the adverse action supported retaliation. 970 F.2d 39 (5th Cir. 1992).[1] In Nishioka's case, though timing to the protected activity is very important, indeed, it is not necessarily the timing of the initial filing that we are concerned about at least with regard to the destruction of the peptides. This case involves the polar opposite with regard to timing, the final dismissal of the Fifth Circuit Appeal of the original lawsuit.

Susan Diane Stanford was the individual responsible for the equipment that stored Nishioka's peptides. In early 1998, she sought to clean out Nishioka's laboratory space and prepare it for the arrival of a new faculty member. She specifically asked her boss, Karen Myers if she could clean out Dr. Nishioka's freezers and laboratory space. Karen Myers informed Ms. Stanford that now that the lawsuit was settled she could go ahead and clear out everything. In the instant case, the issue is not the onset of the protected activity but rather the termination of it. It was only when the Defendant believed that they were no longer subject to any liability that they destroyed Dr. Nishioka's lifetime work.

Defendant denied Plaintiff access to the research materials from the onset of the protected activity. Nishioka requested the peptides both formally and informally many times. Nishioka's supervisor, Dr. Pollock testified that another researcher, Dr. Neil Pellis, removed his research and materials before he left Defendant's employment. To the

[1] Other circuits (Eighth, Sixth, Eleventh and the District of Columbia) have added a fourth prong discussing how much weight should be given a lapse of time. The Fifth circuit has declined to do so.

contrary, Dr. Pellis testified that he had unfettered access to his research and material after he left Defendant's employ. Affidavit of Neal Pellis. The only significant difference between Dr. Pellis and Dr. Nishioka is that Dr. Nishioka engaged in a protected activity. Neal Pellis did not.

Utilizing the above argument, had Dr. Nishioka not engaged in protected activity, he too, would have had unfettered access to his research materials like Dr. Pellis. Had Dr. Nishioka not filed his lawsuit, his materials would not have been discarded in early 1998 as Defendant only gave permission to discard it because "his lawsuit was over". M.D. Anderson denied Dr. Nishioka access to his research material because he engaged in a protected activity AND destroyed that research material because he engaged in a protected activity.

5. M.D. Anderson does not have a legitimate business reason to explain why it discarded Dr. Nishioka's lifetime work.

Though there is uncontroverted testimony that Plaintiff made many verbal requests for the peptides the record does reflect that Plaintiff made at least three formal, requests for the peptides at the injunction hearing on August 31, 1995 and in writing on October 15, 1996 and again on April 30, 1997. M.D. Anderson asserts that it responded to Dr. Nishioka's request on November 19, 1996 but that the letter was returned undelivered. Defendant was in touch with Plaintiff and Plaintiff's attorney at this time (remember Plaintiff had an ongoing lawsuit) but did not attempt to either call Plaintiff or correspond with Plaintiff's attorney regarding Plaintiff's specific requests.

In the letter that Defendant asserts it attempted to send Plaintiff, Defendant released only Item C: Reference Article Files. At this point, almost one and one- half years after firing Plaintiff, Defendant would only release one item, a publicly available one at that. Defendant went on to state that it would have to consider the remaining documents (Items A, B, and D). Defendant misleads by omission – Defendant did not review or consider Item E, the peptides. In fact, though M.D. Anderson later states that the peptides were damaged in the summer of 1996, it did not mention it in that letter.

Only after Dr. Nishioka made a new appeal to the newly appointed president, Dr. John Mendelson, did Defendant respond to Plaintiff, **this time to Plaintiff's attorney.** Finally, Defendant acknowledges that Plaintiff has requested the peptides, informing Plaintiff in great detail that some power outages had occurred in the summer of 1996 causing freezer failures and the Defendant alleges, the destruction of Plaintiff's research materials.

The problems with this argument are many. **If,** there was a freezer failure and subsequent destruction of any research materials, Defendant failed to discuss it with Plaintiff in its letter dated November 19, 1996. Defendant was certainly on formal notice in November of 1996 that Plaintiff wanted those peptides. Second, Dr. Nishioka testified in his affidavit that peptides are very stable at room temperature as long as they remain dry. Defendant testified that the peptides would be damaged from temperature increases. If Defendant did indeed discard these peptides, they may very well have destroyed important viable research. Certainly, many researchers on staff and readily available (as well as Dr. Nishioka) were available to answer any viability questions that Defendant may have had. A material issue of genuine fact

exists as to whether the peptides were viable at the time of the alleged power outages.

The biggest problem with regard to Defendant's argument that the peptides and other research materials in the freezer were discarded in the summer of 1996 is that they weren't. Dan Fontaine's May 1997 letter states "[t]hese samples were moved to another freezer which also failed causing a second temperature increase. When the lab was cleaned this spring, all contents exposed to the two temperature failures were assumed damaged and were eventually discarded. (**This spring** can only reference the spring of **1997** as Dan Fontaine's letter is dated **May 1997.**) Spring or May 1997 is after October 15, 1996 when Dr. Nishioka made a formal request for the peptides. Defendant was on notice that he requested the peptides and if nothing else, withheld them from Dr. Nishioka. Ms. Stanford testified that she did not discard anything belonging to Dr. Nishioka until early 1998.

The importance of these dates is thus: when Kenji Nishioka visited M.D. Anderson to pick up the bulk of his materials and supplies on June 20, 1997, **Defendant still had the peptides.**

Susan Diane Stanford, the individual in charge of the lab testified in her deposition that she recalled that in early 1998 she discarded items that were in the freezer assigned to Dr. Nishioka. If power outages had occurred and items were moved into two different freezers, why then were there items in the freezer originally assigned to Dr. Nishioka on June 20, 1997 when Dr. Nishioka visited M.D. Anderson to retrieve the bulk of his items? Couldn't M.D. Anderson let Dr. Nishioka look at the items in the freezer to determine if they viable?

Plaintiff deposed Diane Stanford on November 16, 2000 at which point she clearly remembered items remaining in the freezer assigned to Dr. Nishioka. It is only in an affidavit specifically crafted to support Defendant's Motion for Summary Judgment signed on December 12, 2000 that she mentions seeing commercially available items and lots of laboratory supplies. However, Ms. Stanford goes on to discuss the items in Dr. Nishioka's freezer separately, certainly indicating that the items in the freezer were products of Dr. Nishioka's research.

Diane Stanford offers the most striking contradiction of Defendant's Summary Judgment evidence. Ms. Stanford asserts, "After Dr. Nishioka left, I was in charge of maintaining his former laboratory." She goes on to say, "I know that another power outage occurred in January of 1997. ...Nevertheless, I did not discard the items related to Dr. Nishioka's research at that time." In fact, I do not recall ever personally discarding those items. Deposition of Susan Diane Stanford. Ms. Stanford does not recall discarding items in Dr. Nishioka's freezer prior to being informed that his lawsuit was over in 1998, in direct contradiction with Dan Fontaine's letter indicating that the research was discarded in early 1997. This information contradicts the letter written by Dan Fontaine, all of which creates a genuine issue of material fact for the jury to determine.

Defendant might have had a legitimate reason for discarding Dr. Nishioka's research after the freezer outage (if they determined that the materials were damaged) and if they had actually discarded it then and if the freezers were not working. However, none of this occurred. The issues of when and why Defendant discarded Dr. Nishioka's work are issues better left for the jury.

6. Inference of Retaliation

On June 12, 2000, the United States Supreme Court issued its opinion in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Although *Reeves* is an age discrimination case, the method of proof in an age discrimination case is similar to the method of proof used in a retaliation case arising under 42 U.S.C. § 2000e-3 *and* therefore, a review of *Reeves* will be helpful at bar. In *Reeves*, the plaintiff successfully sued his employer for age discrimination after he was terminated from his position as a hinge-department supervisor in a toilet seat plant. He was 57 years old at the time and had worked at the plant for 40 years. This Court vacated the trial court verdict in Reeves' favor holding that Reeves did not offer enough proof of an illegal bias. The Supreme Court overturned the decision because Reeves introduced enough evidence to show discrimination based on the *prima facie* case and evidence to show that the proffered reason was false. The Supreme Court unanimously held that a jury can, but is not required, to find intentional discrimination from a plaintiff's *prima facie* case and evidence that the proffered reason for terminating the plaintiff was false.

IV

CONCLUSION

Dr. Nishioka has shown that Court that an important federal question of law should be, but has not been decided by this Court and that compelling reasons exist to do so. Dr. Nishioka has met his *prima facie* case of retaliation and offered evidence to rebut the "legitimate" business reason offered by M.D. Anderson for its actions toward Dr.

Nishioka. Dr. Nishioka respectfully requests that his Petition for Writ of Certiorari be GRANTED.

Respectfully submitted,

ELLEN SPROVACH
Counsel of Record
c/o **Gregg M. Rosenberg & Associates**
11 Greenway Plaza, Suite 2810
Houston, Texas 77046
(713) 960-8300
(713) 621-6670 (Facsimile)

Gregg M. Rosenberg & Associates
Of Counsel

ATTORNEYS FOR PETITIONER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-20603

[Filed February 22, 2002]

KENJI NISHIOKA, Doctor)
)
Plaintiff - Appellant,)
)
v.)
)
UNIVERSITY OF TEXAS)
M D ANDERSON)
CANCER CENTER)
)
Defendant - Appellee.)

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, WIENER and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-20603

[Filed January 23, 2002]

DR. KENJI NISHIOKA,)
)
Plaintiff - Appellant,)
)
v.)
)
THE UNIVERSITY OF)
TEXAS M. D. ANDERSON)
CANCER CENTER,)
)
Defendant - Appellee.)
)

Appeal from the United States District Court
for the Southern District of Texas, Houston
USDC No. 99-CV-1938

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Dr. Kenji Nishioka appeals from the district court's order granting summary judgment in favor of the defendant on Nishioka's Title VII retaliation claim. Nishioka argues that his appeal was timely filed and that the district court erred in concluding that he failed to make out a *prima facie* case of retaliation for failure to show a causal link between his protected activity of filing a Title VII lawsuit and an adverse employment action, including denying him access to and destroying the peptides that were the result of his research. Further, Nishioka argues that he presented sufficient evidence of pretext to go to a jury.

First, there is no issue that Nishioka's appeal was timely filed. To the extent that Nishioka argues that the district court erroneously applied the standard for a Fed. R. Civ. P. 60(b) motion, rather than a Rule 59(e) motion, to his Motion for Rehearing and Reconsideration, Nishioka fails to articulate how the district court applied an incorrect standard or what effect this had on the district court's decision on his motion. Accordingly, we consider this issue waived.[1]

Second, assuming that the denial of access to and subsequent destruction of the peptides was an adverse

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] *See Trevino v. Johnson,* 168 F.3d 173, 181 n.3 (5th Cir. 1999) .

employment action, we conclude that the district court did not err in concluding that Nishioka failed to show the causal connection between his protected activity and an adverse employment action required to make out a *prima facie* case of Title VII retaliation.[2] Here, the protected activity was not this court's decision affirming the district court's dismissal of Nishioka's Title VII case, as Nishioka claims, but rather Nishioka's filing of a Title VII lawsuit, which occurred well over a year before Nishioka first requested and the defendant thereafter destroyed the peptides at issue.[3] This period of time defeats an inference of retaliation based on close timing.[4] Further, Nishioka has not put forward sufficient evidence to establish a genuine issue of material fact that the decision to deny Nishioka access to the peptides at issue and the decision to destroy the peptides, as opposed to other materials which are not the subject of his retaliation claim, were "not wholly unrelated" to his Title VII lawsuit.[5] Accordingly, Nishioka has failed to make a showing of a *prima facie* case of Title VII retaliation, and the district court did not err in granting summary judgment to the defendant on that basis.

---

[2] *See Mato v. Baldauf*, 267 F.3d 444, 450 (5th Cir. 2001).

[3] *Cf. Casarez v. Burlington Northern/Santa Fe Co.*, 193 F.3d 334, 339 (5th Cir. 1999).

[4] *See Mato*, 267 F.3d at 453; *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001); *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 n.3 (5th Cir. 1997).

[5] *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 684 (5th Cir. 2001).

Moreover, even if Nishioka had successfully presented a *prima facie* case, the district court did not err in concluding that, alternatively, Nishioka failed to establish that the defendant's proffered, non-retaliatory reason for destroying the peptides was pretextual.[6] The uncontroverted evidence in the record shows that the peptides were destroyed only after the second freezer failure in early 1997 and that the defendant acted in good faith in discarding the peptides which were presumed to be irreparably damaged.[7] The other evidence to which Nishioka points does not contradict the defendant's explanation as to when and why the peptides were destroyed.

AFFIRMED.

---

[6] *See Mato*, 267 F.3d at 452.

[7] *See Waggoner v. City of Garland*, 987 F.2d 1160, 1165-66 & n.21 (5th Cir. 1993); *cf. Singh v. Shoney's, Inc.*, 64 F.3d 217, 219 (5th Cir. 1995).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-99-1938

[Filed May 9, 2001]

DR. KENJI NISHIOKA,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE UNIVERSITY OF TEXAS M. D. ANDERSON CANCER CENTER,	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

Plaintiff, Dr. Kenji Nishioka, has moved for rehearing and reconsideration of this court's order granting summary judgment to defendant, the University of Texas M.D. Anderson Cancer Center ("M.D. Anderson"). (Docket Entry No. 44). For the reasons set out below, this court DENIES Nishioka's motion for rehearing and reconsideration.

Nishioka filed his motion for rehearing and reconsideration on March 21, 2001. This court entered a final judgment, dismissing this suit with prejudice, on March 7, 2001. Because Nishioka filed his motion more than ten days after the entry of final judgment. FED R. CIV. P 60(b) applies. Rule 60(b) allows a court to relieve a party from a final judgment under the following circumstances:

> (1) mistake, inadvertence, surprise, or excusable neglect, (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud... misrepresentation, or other misconduct of an adverse party; (4) the judgment is void, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of a judgment.

Nishioka does not assert that any of the first five criteria apply. His motion depends on the sixth criteria, the "catch-all."

Rule 60(b) allows the trial court to "correct obvious errors or injustices." *Fackelman v. Bell*, 564 F. 2d 734, 736 (5th Cir. 1977). A party moving under Rule 60(b) must show "unusual or unique circumstances." *Id., Pryor v. U.S. Postal Service*, 769 F.2d 281, 286 (5th Cir. 1985). Courts have held that "Rule 60(b)(6) relief will be granted only if extraordinary

circumstances are present." *Batts v. Tow Motor Forklift Co.*, 66 F. 3d 743, (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1851 (1996); *Straw v. Bowen*, 866 F. 2d 1167, 1172 (9th Cir. 1989) ("a circumstance of hardship that cries out for the unusual remedy of the reopening of a final judgment").

Nishioka presents a number of arguments in support of his motion for reconsideration. This court considered and specifically rejected several of Nishioka's arguments in the memorandum and order granting summary judgment; Nishioka neither raises new arguments nor demonstrates that this court's ruling was an obvious error or injustice.

In granting summary judgment in favor of M.D. Anderson, this court found that: 1) Nishioka had not made a prima facie showing of a causal connection between his discrimination lawsuit and the destruction of his peptides after they had remained in freezer storage for approximately one and one-half years after Nishioka filed his lawsuit; and 2) M.D. Anderson had presented legitimate nonretaliatory reasons for the events that led to the destruction of the peptides. The time span between the lawsuit and the alleged retaliation is substantially longer than periods courts have normally found to raise an inference of causation. *See, e.g., Shackelford v. Deloitte & Touche, LLP*, 190 F. 3d 398, 408 (5th Cir. 1999); *Nero v. Industrial Molding Corp.*, 167 F. 3d 921, 926 (5th Cir. 1999). The undisputed summary judgment evidence also showed that Nishioka's initial inability to access the peptides was attributable to M.D. Anderson's policy requiring a detailed internal review of all research materials requested by a departing scientist, together with Nishioka's own failure to complete a timely inventory of the research materials he sought, and that M.D. Anderson finally

discarded the peptides only after two separate power outages caused temperature fluctuations in the freezers. The undisputed evidence was that M.D. Anderson assumed that the material so exposed sustained damage and should be discarded for that reason.

Nishioka's present challenges to these findings do not raise new arguments or a stronger basis for his previous arguments. Nishioka has not demonstrated "unusual or unique circumstances" warranting the reopening of final judgment in this case. This court DENIES Nishioka's motion for rehearing and reconsideration.

SIGNED on May 9, 2001, at Houston, Texas.

/s/ _____
Lee H. Rosenthal
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-99-1938

[Filed March 7, 2001]

DR. KENJI NISHIOKA,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE UNIVERSITY OF TEXAS M. D. ANDERSON CANCER CENTER,	)
	)
Defendant.	)
	)

FINAL JUDGMENT

For the reasons stated in this court's Memorandum and Order entered this date, this civil action is DISMISSED with prejudice. Each party shall bear its own costs.

Ths is a FINAL JUDGMENT.

SIGNED on March 6, 2001, at Houston, Texas.

/s/ _____
Lee H. Rosenthal
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-99-1938

[Filed March 7, 2001]

DR. KENJI NISHIOKA,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE UNIVERSITY OF TEXAS M. D. ANDERSON CANCER CENTER,	)
	)
Defendant.	)
	)

MEMORANDUM AND ORDER

Plaintiff, Dr. Kenji Nishioka, has sued his former employer, the University of Texas M.D. Anderson Cancer Center ("M.D. Anderson"), alleging retaliation for filing a previous Title VII lawsuit. In his first suit, Nishioka sued under the antidiscrimination provisions of Title VII, alleging that M.D. Anderson's refusal in 1995 to renew his seven-year

research contract was motivated by racial and national origin discrimination. A federal court dismissed the case on summary judgment in 1997, a result affirmed on appeal. Nishioka filed this suit in 1999, under the antiretaliation provisions of Title VII.[1] He contends that in retaliation for the filing of the first lawsuit, M.D. Anderson denied him access to, and subsequently destroyed, some of his research data and materials. Nishioka alleges that this loss has prevented him from obtaining a new research position.

M.D. Anderson moves for summary judgment on the retaliation claim. (Docket Entry No. 30). Nishioka has responded; M.D. Anderson has replied. (Docket Entry Nos. 31, 32). Based on a careful review of the motions, the pleadings, the parties' submissions, and the applicable law, this court GRANTS M.D. Anderson's motion for summary judgment. The reasons are stated below.

I. Background

Nishioka, a biochemist, was a member of the M.D. Anderson faculty from 1972 to 1995 and a professor of surgical oncology from 1983 until his discharge. In August 1994, M.D. Anderson informed Nishioka that it had decided not to grant his application for renewal of his seven-year tenure contract. M.D. Anderson set August 31, 1995 as Nishioka's last day of employment. (Docket Entry No. 30, Ex. A, Att. 1). In 1995, Nishioka filed a charge of discrimination with the Equal Employment Opportunity

---

[1] This court previously granted M.D. Anderson's motion to dismiss the state law intentional infliction of emotional distress claim.

Commission and received a right-to-sue letter. Nishioka then filed a Title VII discrimination lawsuit and requested a temporary injunction to prevent the termination of employment. At a hearing held on August 31, 1995, a United States Magistrate Judge ruled that Nishioka had failed to make the showing necessary for a temporary injunction to issue. (Docket Entry No. 30, Ex. A, Pollock affidavit). The next day, Nishioka returned to M.D. Anderson to begin taking inventory of his research materials and personal belongings. This was the first of many visits Nishioka made over the course of the next thirteen months to inventory, document, and eventually remove many of his research materials.

M.D. Anderson maintains a formal, written policy on the ownership of research data and materials produced by scientists working at M.D. Anderson. Data and other products of research conducted at M.D. Anderson, using M.D. Anderson property, supplies, or employees, are considered M.D. Anderson property. (Docket Entry No. 30, Ex. E, Myers affidavit). If a departing scientist wishes to remove research data or materials on which he or she worked at M.D. Anderson, the scientist prepares an inventory and presents it to M.D. Anderson M.D. Anderson then performs an internal review to determine whether it wishes to claim any of the requested materials because they have value to the institution. *(Id.)*. It is undisputed that on a number of occasions, M.D. Anderson has released research materials for departing scientists' use at other institutions. M.D. Anderson asserts that it typically transfers research data and materials requested by departing scientists to the scientists' new institutions of employment, rather than releasing the information or materials directly to the individual scientist. (Docket Entry No. 30, Ex. A, Pollock affidavit).

In this case, it is undisputed that Nishioka failed to provide M.D. Anderson with an inventory of the data or materials he wanted to take from the institution before his last date of employment on August 31, 1995. M.D. Anderson has submitted uncontroverted summary judgment evidence that it is standard practice for researchers to submit such an inventory before leaving their employment. M.D. Anderson has also submitted uncontroverted evidence that such an inventory is necessary for it to determine whether it has an ownership interest in any of the research data or material.

During the latter part of 1995, and into the summer of 1996, Nishioka made periodic visits to M.D. Anderson to conduct the inventory of his materials and data. The record indicates that he made approximately twenty visits to M.D. Anderson during this period. (Docket Entry No. 30, Ex. D, Stanford affidavit). During each such visit, an M.D. Anderson staff member accompanied Nishioka, in keeping with the institution's practice of requiring staff supervision of all nonemployee visitors to the M.D. Anderson research facilities. *(Id.)*. On several occasions, difficulties in scheduling staff accompaniment prevented Nishioka from visiting M.D. Anderson at times of his choice. M.D. Anderson asserts that Nishioka's failure even to begin an inventory of his research data and materials before his employment ended, as well as the difficulties in scheduling supervised visits necessary for him to conduct the inventory after his employment ended, contributed to his delay in completing the inventory process. (Docket Entry No. 30, Ex. A, Pollock affidavit).

On October 15, 1996, over a year after he left M.D. Anderson, Nishioka sent a letter to Dr. Raphael Pollock, the

Chairman of the Department of Surgical Oncology at M.D. Anderson, formally requesting the release of five categories of his research materials. Nishioka designated these categories by letter: A, B, C, D, and E. Item "E" was described as "Tuftsin and Other Peptide Preparations." (Docket Entry No. 30, Ex. D, Att. 1).

On November 19, 1996, Pollock responded in writing, stating as follows: "At this time, I am releasing *Item C: Reference Article Files* to your permanent possession. However, the remaining documents (Items A, B, and D) will require further consideration prior to their release." (Docket Entry No. 30, Ex. A, Att. 3). Pollock's letter did not mention Item E, the peptide preparations. The record shows that certified delivery of this letter was attempted three times, without success. *(Id.)*.

On March 5, 1997, the federal district court dismissed Nishioka's original Title VII suit on summary judgment. On April 30, 1997, approximately six months after his first formal request for the return of the materials, Nishioka wrote a second letter. Nishioka addressed this letter to John Mendelson, M.D., President of M.D. Anderson. (Docket Entry No. 31, Ex. A-2). Within two weeks, Dan Fontaine, Chief Legal Officer of M.D. Anderson, responded in writing, informing Nishioka that he could come to pick up the items listed as A-D in his first letter. As to the peptides, listed as item E in the first letter, Fontaine stated as follows:

> ...we are not sure what materials [Dr. Nishioka] is referring to in section E of his list. However, in the summer of 1996, the lab freezer failed and all contents experienced a

> sustained temperature increase. These samples were moved to another freezer which also failed causing a second temperature increase. When the lab was cleaned this spring, all contents exposed to the two temperature failures were assumed damaged and eventually discarded.

(Docket Entry No. 31, Ex. A-3).

Nishioka went to M.D. Anderson on June 20, 1997 to retrieve the available materials released to him. Susan Stanford, Laboratory Coordinator for the Department of Surgical Oncology, accompanied Nishioka on that visit. (Docket Entry No. 30, Ex. D, Stanford affidavit). Stanford testified that during that visit, Nishioka did not request access to his former laboratory or to the freezers he had used during his employment. *(Id.)*. At the end of the visit, Nishioka signed a document acknowledging receipt of the items he retrieved. At the bottom of this document, Nishioka noted that he "did not receive any peptides today." (Docket Entry No. 30, Ex. D, Att. 2). Nishioka filed this lawsuit on June 21, 1999.[2]

---

[2] Nishioka filed his initial charge of retaliation with the Equal Employment Opportunity Commission on March 4, 1998. Under Title VII, a plaintiff must file a charge of employment discrimination within one hundred and eighty days after the alleged unlawful employment practice occurred, or, in a case where a plaintiff has also instituted proceedings with an appropriate state agency, within three hundred days of the alleged unlawful employment practice. 42 U.S.C. §2000e-5(e)(1). In Texas, the three hundred day period is presumed to apply, due to "the EEOC's routine transmittal of a copy of the complaint to the state referral

Susan Stanford, whose job gave her supervisory responsibility over laboratory maintenance, also submitted an affidavit stating that she recalled the two power outages affecting the freezers, the first occurring in the late spring or early summer of 1996 and the second in January 1997. Stanford testified that after the first power outage, the items in the freezers, including the ones that Nishioka had used during his employment, were transferred to a new freezer. After the second power outage, Stanford did not immediately discard the affected items. Stanford did not recall personally discarding Nishioka' s peptides. She stated that she had"no personal knowledge of when, or if those items were ever thrown out." (Docket Entry No. 30, Ex. D, Stanford affidavit). Stanford testified that early in 1998, she learned that Nishioka's lawsuit was over. At that time, she requested permission to clean out his laboratory space and prepare it for the arrival of a new faculty member. Stanford "was told that she could clean out the lab now that the lawsuit was over and Dr. Nishioka had retrieved everything in M.D. Anderson's possession that he had requested." (Docket Entry No. 30, Ex. D, p. 4, Stanford affidavit). Stanford stated in her affidavit that when she cleaned the laboratory space formerly assigned to Nishioka, she disposed of commercially available items, but did not recall "disposing of anything in the freezers that related to Dr. Nishioka" in 1998. *(Id.)*. In her deposition,

---

agency." *Urrutia v. Valero Energy Corp.*, 841 F.2d 123, 125 (5th Cir. 1988). Because M.D. Anderson has not raised limitations as an affirmative defense, this court will not consider the limitations question. *See Zipes v. Trans World Airlines,* 455 U.S. 385 (1982) (holding that filing timely charge of discrimination with the EEOC was not a jurisdictional prerequisite to suit in federal court, but rather a defense winch was subject to waiver).

however, Stanford did recall that in 1998, there were a few remaining items in the freezer space previously assigned to Nishioka, which she discarded to prepare for new faculty. (Docket Entry No. 31, Stanford Dep. p. 16-17, 30). The freezers themselves were discarded a short time later.

In its reply to Nishioka's response, M.D. Anderson clarified that the peptides were discarded in early 1997, with other materials from freezers exposed to the temperature fluctuation, because they were assumed damaged from the temperature increases. (Docket Entry No. 32, p. 6). Both Pollock and Stanford testified that items stored in a freezer and subjected to two temperature increases were presumed damaged and would be discarded in the normal course of laboratory maintenance. (Docket Entry No. 30, Ex. A, Pollock affidavit; Docket Entry No. 30, Ex. D, Stanford affidavit). Nishioka asserts that subjecting the peptides to a temperature increase would not have damaged them, as long as they remained dry. (Docket Entry No. 31, Nishioka affidavit). However, Nishioka does not dispute that many materials stored in a freezer would be damaged by not just one, but two, power outages and resulting temperature fluctuations. Nor does Nishioka dispute that laboratory workers would routinely presume that such damage had occurred.

Nishioka contends that the destruction of the peptides has harmed his career. He asserts that the biomedical research field is very competitive and that as a researcher, he cannot effectively search for a new position because he cannot present lectures with slides showing his current research work, and because he has no ongoing research to bring to a new institution. (Docket Entry No. 16, p. 4).

M.D. Anderson seeks summary judgment on two grounds: Nishioka has failed to make a prima facie showing of retaliation; and, alternatively, Nishioka has failed to raise a disputed fact issue material to determining whether M.D. Anderson's stated reasons for the actions Nishioka challenges are pretexts for retaliation. Each of these arguments is examined below.

II. The Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56. Under FED. R. CIV. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir. 1994). The party moving for summary judgment must demonstrate the absence of a genuine issue of material fact, but need not negate the elements of the nonmovant's case. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response. *See id.*

When the moving party has met its Rule 56(c) burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. *See McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995). The nonmovant must go beyond the pleadings and designate specific facts showing that

there is a genuine issue for trial. *See Little,* 37 F.3d at 1075 (citing *Celotex,* 477 U.S. at 325).

"[W]hen a district court denies a motion for summary judgment on the basis that there exist genuine issues of material fact, the district court is actually making two separate conclusions: 'First, the court has concluded that the issues of fact in question are genuine, i.e., the evidence is sufficient to permit a reasonable factfinder to return a verdict for the nonmoving party. Second, the court has concluded that the issues of fact are material, i.e. resolution of the issues might affect the outcome of the suit under governing law.'" *Lemoine v. New Horizons Ranch & Ctr., Inc.,* 174 F.3d 629, 633 (5th Cir. 1999) (quoting *Colston v. Barnhart,* 146 F.3d 282, 284 (5th Cir. I998)).

In deciding a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). "Rule 56 '*mandates* the entry of summary judgment, after adequate time for discovery, and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will beat the burden of proof at trial.'" *Little,* 37 F.3d at 1075 (quoting *Celotex,* 477 at 322).

III. The Title VII Retaliation Standard

A plaintiff establishes a prima facie case of retaliation by showing that: (1) he engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) there was a causal connection between the protected activity and the

adverse employment decision. *Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 41 (5th Cir. 1992). The establishment of a prima facie case gives rise to an inference of retaliation. *Id.* This inference, in turn, shifts the burden of proof to the defendant, who must then articulate a legitimate nondiscriminatory reason for the challenged employment action. *Id.*; *McDonnell Douglas Corp. v. Green,* 411 U.S. 792,801-803 (1973). The Fifth Circuit has held that if there is a close timing between an employee's protected activity and an adverse employment action, the employer must offer "a legitimate, nondiscriminatory reason that explains both the adverse action and the timing." *Swanson v. General Services Admin.,* 110 F.3d 1180, 1188 (5th Cir. 1997). The plaintiff need not show that the protected activity was the sole factor motivating the adverse action, but he must show that "but for" the protected activity, he would not have been subjected to the adverse employment action. *Id.; Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 507 (5th Cir. 1994).

If the plaintiff can establish a prima facie case, the burden of production shifts to the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. *Jones v. Flagship Intern.*, 793 F.2d 714 (5th Cir. 1986), *cert. denied,* 479 U.S. 1065 (1987). The burden then shifts back to the plaintiff to show that the defendant's proffered reason is pretextual. *Id.*

The question on summary judgment is whether there is a genuine dispute material to determining whether the employer's proffered reason was a pretext for retaliation. Put another way, once a defendant articulates a legitimate, nonretaliatory reason for its action, the burden shifts to the plaintiff to point to evidence in the summary judgment record

showing that he would not have suffered the adverse employment action in the absence of his having engaged in protected conduct. *Long v. Eastfield College,* 88 F.3d 300, 304n.4 (5th Cir. 1996) (the "ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision") (citing *McDaniel v. Temple Indep. Sch. Dist.*, 770 F.2d 1340, 1346 (5th Cir. 1985)).

IV. Analysis

M.D. Anderson does not dispute the first two elements of Nishioka's prima facie case. Nishioka engaged in a protected Title VII activity when he filed suit in August 1995. Nishioka alleges that M.D. Anderson subjected him to different requirements for obtaining his data and materials than it imposed on other departing research scientists and eventually destroyed some of his research material. M.D. Anderson denies that Nishioka can satisfy the third element of his prima facie case, a causal link between his 1995 lawsuit and the subsequent employment actions he challenges.

A. The Prima Facie Case

Nishioka alleges that M.D. Anderson treated him differently than other departing scientists, who did not file lawsuits against M.D. Anderson, by refusing to grant him prompt access to his research data and materials and permission to remove them from M.D. Anderson's premises; requiring him to be supervised by a staff member during his visits to M.D. Anderson; and eventually destroying the peptides that had been stored in freezers before, and after, Nishioka's employment.

The summary judgment record supports M.D. Anderson's position that it applied the same policies and procedures to Nishioka as to other departing scientists. M.D. Anderson has presented competent, and undisputed, summary judgment evidence that the delay in Nishioka's access to his research material was due to his own failure to comply with these policies and procedures. *See, e.g., Haynes v. Pennzoil Co.*, 207 F.3d 296, 299 (5th Cir. 2000) (no causal connection between discharge and protected activity when the record showed that the employer was following a corporate restructuring plan calling for a series of layoffs).

M.D. Anderson has submitted its written policy under which it presumptively owns research data and material generated by its employees that might have value to the institution. (Docket Entry No. 30, Ex. E, Att. 1). M.D. Anderson requires, as standard practice, that all departing research scientists submit an inventory of the research data and materials they wish to take with them, to permit M.D. Anderson to conduct an internal review to determine whether the data or material have value that would preclude or limit their release. M.D. Anderson has submitted competent, and undisputed, summary judgment evidence that other departing research scientists completed the required inventories of their research data and materials before their employment ended, avoiding the necessity of returning later to complete the inventory process. M.D. Anderson told Nishioka a year in advance, in August 1994, that his contract would not be renewed and that August 31, 1995 would be his last day of employment. However, it is undisputed that Nishioka did not begin to prepare the inventory of materials and data he had developed as an M.D. Anderson employee, that he wanted M.D. Anderson to release, until after his employment ended.

M.D. Anderson has also submitted uncontroverted evidence that a nonemployee cannot visit the M.D. Anderson research laboratories unless a staff person is present. It is undisputed that once Nishioka was no longer an employee, M.D. Anderson policy required that he be supervised by an M.D. Anderson staff member during his return visits to the M.D. Anderson laboratories. Nishioka has submitted no competent summary judgment evidence that he was singled out or treated differently than other departed research scientists who returned to the laboratories after their employment ended. It is undisputed that the requirement of staff supervision and the difficulty of matching Nishioka's schedule with staff availability contributed to Nishioka's delay in completing the inventory.

It is undisputed that Nishioka did not present a formal request for the return of his data and materials until October 1996, over a year after his employment ended and after he had filed his discrimination lawsuit. It is undisputed that in November 1996, M.D. Anderson told Nishioka that it would release one category of the materials he requested and would continue to examine three other categories. The letter did not mention the peptides. However, Nishioka waited another six months before sending a second written request seeking the release of the remaining materials, including the peptides.

During the intervening period, according to the undisputed summary judgment evidence, the freezers in which M.D. Anderson had continued to store Nishioka's peptides experienced two separate power outages, causing temperature fluctuations. The uncontroverted evidence shows that M.D. Anderson kept Nishioka's peptides in laboratory freezers until at least early 1997, over one and one-half years after his

employment ended and after he filed his lawsuit. It is undisputed that M.D. Anderson did not destroy the peptides until the two power outages had caused temperature fluctuations in the freezers in which they were stored. It is undisputed that Nishioka' s other research materials remained at M.D. Anderson for several more months, until he finally removed them in June 1997, two years after he had filed his original lawsuit.

In short, M.D. Anderson retained Nishioka's data and materials long after his employment ended. In June 1997, Nishioka retrieved the materials he sought, with two exceptions: the peptides, destroyed in early 1997; and some other materials that Nishioka left unclaimed. As to the peptides, the evidence shows that M.D. Anderson retained these materials in freezer storage for over one and one-half years, discarding them only after two separate power outages caused temperature fluctuations. Nishioka retrieved other materials in June 1997. He does not appear to complain about materials he left after his June 1997 visit, that M.D. Anderson discarded as abandoned in 1998.

Close timing between protected Title VII activity and an adverse employment decision can support an inference of causation. *See Swanson,* 110 F.3d at 1188; *Mayberry v. Vought Aircraft Co.,* 55 F.3d 1086, 1092. However, the present record discloses no competent facts supporting a causal connection between Nishioka's original lawsuit and M.D. Anderson's subsequent limits on his access to research data and materials generated during his employment. The present record discloses an extended period between Nishioka's protected Title VII activity and the destruction of the peptides. Assuming the facts in the light most favorable to

Nishioka, approximately one and one-half years elapsed between the filing of Nishioka' s lawsuit and the destruction of the peptides. This time span substantially exceeds the periods courts have normally found to raise an inference of causation. *See, e.g., Shackelford v. Deloitte & Touche, LLP,* 190 F.3d 398, 408 (5th Cir. 1999) (plaintiff fired on same day she was seen talking on phone with lawyer, one day after she had sought to meet with supervisor concerning racial discrimination claim, and one week after she was listed as potential witness in suit, had presented evidence of causation); *Nero v. Industrial Molding Corp.,* 167 F.3d 921, 926 (5th Cir. 1999) (plaintiff fired days after having a heart attack had presented evidence of causation); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1092 (5th Cir. 1995) (when plaintiff was suspended "at least several years" after protected activity had begun, inference of causation was not raised); *E.E.O.C. v. MCI Telecommunications Corp.,* 820 F.Supp. 300, 310 (S.D. Tex. 1993) (employee's comment made six months before her termination was "not close in time" and was not causally connected to her termination).

The present record shows that it was not until Nishioka's lawsuit had been dismissed and the dismissal affirmed on appeal that M.D. Anderson authorized the destruction of the materials Nishioka had left for almost three years. The evidence appears to show that, if anything, the lawsuit Nishioka filed in 1995 led M.D. Anderson to delay in discarding material Nishioka had left in the laboratory until 1997 and 1998. Such a record does not constitute a showing of a causal connection required for a prima facie case of retaliation. M.D. Anderson is entitled to summary judgment.

B. The Employer's Legitimate, Nonretaliatory Reason and the Absence of Evidence of Pretext

Even assuming that Nishioka had shown a prima facie case of retaliation, M.D. Anderson has presented legitimate nonretaliatory reasons for delaying and limiting Nishioka's access to his research materials and data. Nishioka has not presented competent summary judgment evidence to dispute M.D. Anderson's explanation that Nishioka failed to comply with the policies and practices generally applicable to departing research scientists, causing the delay in providing him the materials and data he sought to retrieve.

As to the destruction of the peptides in the spring of 1997, M.D. Anderson has also presented a legitimate explanation. M.D. Anderson discarded the freezer contents that had been exposed to the temperature fluctuations in 1996 and early 1997 (Docket Entry No. 31, Ex. A-3). The undisputed evidence is that M.D. Anderson assumed that the material so exposed sustained damage and should be discarded. Nishioka challenges the proposition that a temperature increase necessarily would have damaged the peptides.[3] However, the relevant issue for this court is not the

---

[3] M.D. Anderson has objected to this statement by Nishioka on the ground that it constitutes inadmissible opinion testimony. M.D. Anderson has also objected to and moved to strike the affidavits of Nishioka and Dr. Marvin Rohmasdahl in their entirety, and seventeen separate statements in these affidavits individually. (Docket Entry No. 32). Nishioka has in turn moved to strike M.D. Anderson's motion to strike. (Docket Entry No. 33). After reviewing the two affidavits, including the particular

scientific question of whether temperature fluctuations would in fact cause damage to frozen peptides. Instead, the relevant issue is whether employees at M.D. Anderson believed in good faith that materials stored in the freezers, including the peptides, had been damaged, and disposed of them for this reason. *See, e.g., Waggoner v. Garland, Texas,* 987 F.2d 1160, 1165 (5th Cir. 1993); *Singh v. Shoney's, Inc.,* 64 F.3d 217, 219 (5th Cir. 1995). Nishioka has presented no summary judgment evidence controverting the explanation M.D. Anderson provided in the May 13, 1997 letter from Fontaine, that the peptides had been discarded with the contents of the faulty freezers in a general cleaning of the laboratory.

Nishioka has failed to present evidence to controvert M.D. Anderson's nonretaliatory reasons for the actions it took with respect to the research data and materials Nishioka had generated during his employment. Summary judgment is appropriate.

V. Conclusion

This court GRANTS defendant's motion for summary judgment. The case will be dismissed by separate order.

---

statements to which M.D. Anderson specifically objects, this court concludes that the admission of these affidavits and statements would not affect the court's disposition of this case. This court therefore assumes, without deciding, that the statements are admissible.

SIGNED on March 6, 2001, at Houston, Texas.

/s/ _____
Lee H. Rosenthal
United States District Judge